# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 25, 2014 |
| v | No. 317345<br>Saginaw Circuit Court |
| IRENE CHRISTINE CASTILLO,<br><br>Defendant-Appellant. | LC No. 12-037187-FH |

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction following a jury trial of felonious assault, MCL 750.82. Defendant was originally sentenced to serve 14 months' to 4 years' imprisonment. Subsequently, on April 3, 2014, she was resentenced to serve 542 days' imprisonment with credit for 542 days served, and 36 months of probation. We affirm.

## I. FACTUAL BACKGROUND

On November 24, 2011, around 2:00 a.m., a fight broke out at the Red Horse Bar. The victim, Talia Deleon,[1] and Savanna Deleon were at the bar together with friends. At some point, Savanna was approached by her cousin, Sarita Mata, who asked Savanna if she was mad that Mata was with a guy that Savanna previously had been friends with. Savanna denied she was upset, but the conversation escalated until both Savanna and Mata were arguing loudly. Talia testified that she was trying to calm things down when defendant walked up and demanded to know what the problem was. Defendant explained that she had seen the argument between Mata and Savanna and had come over to take Mata away. According to Talia, she took Mata and they headed toward the door. However, as she reached the door, she heard Savanna screaming. When she looked back, Savanna was holding her eye and screaming that she had been hit. Defendant admitted that she backhanded Savanna, but claimed at trial that it was after Savanna had "swatted" her hand down five or six times.

[1] The jury acquitted defendant of a second count of the felonious assault of Savanna Deleon.

However, Talia and Savanna testified that after Savanna identified defendant as the person who hit her, Talia demanded to know why she had done it. Talia explained that defendant suddenly lunged and grabbed her by her hair and started a fistfight that was quickly broken up by the bouncers. Talia testified she then went to get her purse and keys. On her way, she heard glass break, after which defendant attacked her again. After the fight was broken up, Talia discovered a piece of glass in her neck, which she pulled out. Talia and Savanna were ordered out of the bar and went to the hospital in a friend's car.

In contrast, defendant testified that after she struck Savanna, she noticed a group of six to seven people approaching her. She testified that they were yelling and threatening her. Because she was afraid for her life, defendant testified, she broke a bottle on the bar and told them not to come any closer. She said that Talia came at her anyway and they fought. Defendant admitted that she used the broken bottle to stab Talia in the neck.

## II. REQUEST FOR ADJOURNMENT TO PROCURE WITNESS

Defendant first argues that the trial court abused its discretion when it denied her request for an adjournment to procure Mata as a witness. We disagree.

"This Court reviews the grant or denial of an adjournment for an abuse of discretion." *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

Defendant also argues that by denying the adjournment, the trial court deprived her of her constitutional right to present a complete defense. Because defendant did not raise this constitutional challenge in the lower court, it is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Unpreserved constitutional errors are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "This requires the defendant to show that the plain error affected the outcome of the proceedings." *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

On the third day of trial, defendant's attorney asked the trial court for permission to have Mata testify either later in the day or the next morning because Mata's grandmother had just been taken off of life support. The court stated that the trial would continue, but noted that during the lunch break defendant could attempt to procure Mata as a witness. Further, the court stated that if there was a subpoena and if Mata did not cooperate, the court would issue a bench warrant. After the break, defendant testified and then rested.

"[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence." *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). " 'Good cause' factors include 'whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.' " *Id.*, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Additionally, MCR 2.503(C)(2) provides that "[a]n adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds

that the evidence is material and that diligent efforts have been made to produce the witness or evidence." "Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Coy*, 258 Mich App at 18-19.

Here, the record does not clearly indicate that defense counsel exercised due diligence in securing Mata as a witness. Defense counsel stated that he "tried to get a subpoena to" Mata, but that he had not "got the return yet" so he could not prove that she had been served. Moreover, on the third day of trial, he stated that a couple of days prior, Mata's family talked to him about taking Mata's grandmother off life support. Accordingly, it is not even clear that defense counsel made the motion for an adjournment "as soon as possible after ascertaining the facts" as required by MCR 2.503(C)(1).

Further, defendant did not show good cause for the adjournment. Defendant requested permission to postpone Mata's testimony until later in the day or until the next morning. The court stated that it was going to take a break, during which defendant could attempt to procure Mata as a witness. The court expressly stated that if Mata was "not going to cooperate, I am going to issue a bench warrant if you've got the subpoena." In other words, the court offered to compel Mata's presence if necessary. It is not clear from the record whether Mata was actually subpoenaed as a witness, whether defendant attempted to secure her attendance during the break, or even whether defendant requested the court to issue a bench warrant. What is clear from defense counsel's representations to the court is that defendant knew where Mata was-the hospital where Mata's grandmother was located. Thus, on these facts, there was no good cause for an adjournment.

Further, while Mata may have been able to testify about the previous incident with Savanna, defendant did not make an offer of proof as to what Mata would have testified about. Accordingly, Mata's testimony could have supported Savanna and Talia's version of events or it could have supported defendant's version. Nothing on the record allows this Court to do more than speculate about the substance of Mata's testimony. Thus, defendant has failed to establish prejudice. The trial court did not abuse its discretion in refusing to grant defendant's request for a continuance.

Turning to defendant's constitutional argument, it is undeniable that "defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "But this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (citations and internal quotation marks omitted). Here, defendant was not denied her right to present a defense when the trial court denied her motion for an adjournment to procure Mata as a witness because, as discussed above, defendant failed to establish that the trial court erred by denying her request or that she was prejudiced as a result. *King*, 297 Mich App at 472 (instructing that an unpreserved claim of constitutional error requires the defendant to show that the plain error affected the outcome of the proceedings). In other words, defendant has not established that the denial of the adjournment was a plain error affecting her substantial rights.

## III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct, which violated her right to remain silent and her right to a fair trial. "Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Here, defendant did not object to the claimed instances of prosecutorial misconduct and did not request a curative instruction. Accordingly, we review defendant's assertions for plain error affecting her substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Bennett*, 290 Mich App at 475-476. Moreover, this Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id*. at 476.

Defendant first argues that the prosecutor committed misconduct during voir dire when he made several comments about accountability and taking responsibility for one's actions. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). During his examination of Juror 25 about his criminal history and a 20-year-old misdemeanor conviction. The two had the following exchange:

> *Prosecutor*. Okay. Is that something you pled guilty to—
>
> * * *
>
> *Juror 25.* The misdemeanor?
>
> *Prosecutor*. The misdemeanor 20 some years ago?
>
> *Juror 25.* I don't remember if it was like no contest or—
>
> *Prosecutor*. But you didn't go to trial?
>
> *Juror 25.* No.
>
> *Prosecutor*. You accepted responsibility for it?
>
> *Juror 25.* Yes.
>
> *Prosecutor*. Okay. And do you think that's important for a person to accept responsibility for their actions?
>
> *Juror 25.* Yes.

The prosecutor also questioned Juror 9 about when someone broke into the juror's storage room and car. Juror 9 stated that he was "kind of" upset because the Saginaw Police Department never contacted him and that it would "[m]aybe" affect his ability to judge a Saginaw Police officer's credibility. "And, of course," the prosecutor commented "you would want somebody to be responsible and held accountable for that, right?" Juror 9 indicated that he would want someone to be held responsible and accountable.

Finally, the prosecutor had an exchange with Juror 14 concerning his wife being accused of embezzlement 16 years prior:

> *Prosecutor*. Do you think she was being treated unfairly by the prosecution?
>
> *Juror 14.* No, sir.
>
> *Prosecutor*. No, sir? So did you think she was accountable or responsible for what they accused her of?
>
> *Juror 14.* Sure, she knew what she was doing.
>
> *Prosecutor*. Okay. So the fact that she knew what she was doing, did she end up pleading guilty?
>
> *Juror 14.* Yes.
>
> *Prosecutor*. Okay. So I guess I'm just going to ask you, is there anything about that case that you would hold against the prosecution or myself in this case?
>
> *Juror 14.* Not at all, not at all, sir.
>
> *Prosecutor*. Okay. So are you a person that thinks that people need to be held accountable for their actions?
>
> *Juror 14.* Yes, at time, yes.
>
> *Prosecutor*. Okay. If they did something wrong, either they should accept responsibility and admit to it; or, in this case, we have a trial and the jury will determine.
>
> *Juror 14.* Yes, sir.

"In voir dire, meaning 'to speak the truth,' potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). Here, in context, it is apparent that the prosecutor was attempting to find out if any of the prospective jurors were prejudiced by their interactions with the legal system. It does not appear to us that the prosecutor was deliberately commenting on defendant's decision to take the case to trial as opposed to pleading guilty and "accepting responsibility" for her actions. Instead, the prosecutor properly attempted to

determine bias—particularly against the prosecutor's office. For example with jurors 25 and 14 the prosecutor was exploring whether there was any residual resentment being harbored toward the prosecutor's office for the prosecutions in the jurors' backgrounds. The questioning of juror 9 is more questionable, since it was exploring the juror's feelings toward the criminal justice system as a victim of crime. But, the questioning can reasonably be understood as attempting to uncover any lingering animosity felt by juror 9 toward police and prosecutors.

Further, the trial court instructed the jury that the attorneys' statements, arguments, and comments were not evidence and that the case had to be decided based upon the evidence. We see nothing on this record to call into doubt the presumption to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor also improperly commented on accountability during closing argument. The comments challenged on appeal, in context, are as follows:

> Assault cases that occur in bars are not fun cases for prosecutors to try. Often everybody in the case had been drinking or is intoxicated, much like this case. Also bar employees, bar owners, for liability reasons, don't like to come in and testify either, just like this case.
>
> But does that mean that as prosecutors we should not prosecute assaults that occur in bars? I hope you don't feel that way, because whether it happens in a bar or out on the street or in a school, or wherever, if someone assaults, physically assaults somebody else, they should be held accountable.
>
> *And over the last few years of doing this work, I've done it now over 20 years, but the last few years when people ask me, you know, what type of work do you do, I don't say I'm a prosecutor. I say I'm an accountability specialist. I hold people accountable or try to hold people accountable. Because that's what I feel is my job. And really my job is to convince you, the jury, to hold somebody accountable, and that's what I'm going to ask you today, to hold the defendant, Irene Castillo, accountable for her actions that she did that night.*
>
> We teach our children at a very young age that you have to be accountable for your actions, and certainly the defendant should have learned that lesson years and years ago. She's 40 some years old, certainly old enough to know better than to behave the way she did back in November of 2011. [Emphasis added.]

These comments were improper. A prosecutor may not express a personal belief in the defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 792 NW2d 53 (1995), nor use "the prestige of the prosecutor's office to inject personal opinion," *id*. at 286. Here, the prosecutor's comments clearly indicate that, independent of the evidence, he believed that defendant was not only guilty, but was also refusing to take responsibility for her actions. By calling himself an "accountability specialist," he effectively, and improperly, placed the prestige of his office behind his belief that defendant was guilty. Nonetheless, although the comment was improper, any prejudice was effectively cured by the court's instruction that the prosecutor's comments were not evidence. See *Graves*, 458 Mich at 486.

Next, defendant argues that the prosecutor committed misconduct by soliciting testimony that defendant's Facebook page referred to her as "Momma Ice" and then arguing during closing statements that her Facebook page showed what type of person she was. During direct examination, Talia Deleon testified that she provided Saginaw Police Detective Thomas McInerney with defendant's Facebook page, which identified defendant as "Irene 'Momma Ice' Castillo." And Saginaw Police Officer Matthew Eckerman testified that he listed the suspect as "[a]n Irene—I'm not sure of how to pronounce the middle name. I put it in as M-O-M-M-A-I-C-E Castillo." Savanna Deleon testified that she gave the police defendant's name and that she went "on Facebook to show exactly who she was." The Facebook page, including the reference to "Momma Ice" was admitted into evidence without objection. Defendant asserts that all of the references to "Momma Ice" consisted of improper character evidence. Pursuant to MRE 404(b), "[e]vidence of other crimes, wrongs, or acts" is not admissible "to prove the character of a person in order to show action in conformity therewith." However, the evidence may be admissible for other purposes, including to prove "identity." MRE 404(b).

Any and all references to the "Momma Ice" moniker do not implicate MRE 404(b) because the nickname is not evidence of another crime, wrong, or act. Moreover, it is a name that defendant has voluntarily identified herself with. In any event, the prosecutor did not err in soliciting testimony about defendant's Facebook page because the social networking site was used to show the identity of the perpetrator, and identity is an essential element of any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Contrary to defendant's assertion that identity was irrelevant in this prosecution because she essentially conceded that she committed the acts, the prosecutor was still required to prove that she was the perpetrator beyond a reasonable doubt. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70.

Defendant also argues that as it appeared on defendant's Facebook page, the name "Momma Ice" was a statement pursuant to MRE 803(a) because it constituted nonverbal conduct intended as an assertion. She goes on to argue that the use of the statement was unfairly prejudicial and should have been excluded under MRE 403's balancing test because its probative value was substantially outweighed by the danger of unfair prejudice.[2] Because the issue is unpreserved, defendant must show that there was plain error in admitting the testimony. *Thomas*, 260 Mich App at 453-454, which she fails to do because she has failed to show that it affected her substantial rights, i.e., she cannot show that it affected the outcome of the trial, *Carines*, 460 Mich at 763.

Finally, the references to "Momma Ice" during closing argument were not improper. Generally, prosecutors have great latitude in their arguments and conduct and are free to argue any reasonable inference that may arise from the evidence. *Bahoda*, 448 Mich at 282. Further,

[2] Defendant does not explain how the statements would be unfairly prejudicial. She just claimed that the "use of them by the prosecution was unfairly prejudicial" after asserting that the "Momma Ice" references were nonverbal conduct that should be considered a statement under MRE 801(a).

when arguing the inferences, a prosecutor does not have to use the blandest terms available. *Dobek*, 274 Mich App at 66. Here, the prosecutor stated in closing:

> Talia—she said she didn't even know the defendant before this incident. Savanna knew of her because of relation but they were able to show Detective McInerney exactly who she was, and it was Irene "Momma Ice" Castillo. And you can take this back in the jury room and look at it more closely. It was Momma Ice that did the injuries to Talia's neck.

Because the Facebook page with defendant's nickname and the witness testimony identifying her as "Momma Ice" were already admitted, the prosecutor did not commit misconduct by arguing that evidence during closing argument.

Defendant next argues that the prosecution committed misconduct by making repeated references to defendant's failure to file a police report of the incident at the bar or to contact the police. She argues that she had no obligation to contact the police and that it is improper to elicit evidence or make comments about a defendant's refusal to explain his or her actions or to deny guilt. A prosecutor may comment on a defendant's failure to report a crime when reporting the crime would have been natural if the defendant's version of the events were true. *Lawton*, 196 Mich App at 353.

Officer Eckerman testified that he was not aware of anyone else—besides Talia and Savanna Deleon—making a police report of the incident at the Red Horse Bar. Detective McInerney also testified that he was unaware of any other reports regarding the incident. He further testified that he obtained an address for defendant, went to her home three times, and left a business card three times after no one answered the door. He testified that defendant never called and he never spoke to her. Under questioning by the prosecutor, defendant admitted that she never called the police, but she also said that Detective McInerney never left anything in her door.

During rebuttal, the prosecutor directed the jury to several aspects of defendant's testimony that, in the prosecutor's opinion, showed a lack of credibility. On the issue of defendant's failure to contact the police, the prosecution argued as follows:

> And if she really was in a position of self-defense, then why didn't she go tell the police right away? She knew there was an incident. There was word that the police were likely to come to the bar, so she knew the police were likely to be involved, but she didn't bother to go let them know that she was in a position that she felt her life was threatened and she had to use self-defense.

If defendant's theory of the case were correct and she was assaulted by five or six individuals in the bar, then it would have been natural for her to report the crime. *Id.* Accordingly, the prosecution did not commit misconduct by soliciting testimony about her failure to do so. Further "[a] defendant's constitutional right to remain silent is not violated by

the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[3] warnings have been given." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). "A prosecutor may not comment on a defendant's silence in the face of accusation, but may comment on silence that occurred *before any police contact*." *Id*. (emphasis added). Here, the comments on defendant's silence were comments on her pre-arrest silence. And, with respect to the closing argument, the comments were reasonable inferences that could be drawn from the properly evidence admitted at trial. The prosecutor committed no misconduct that deprived defendant of her right to a fair trial.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Deborah A. Servitto

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).